(2)

No. 89-748

In the Supreme Court of the United States

OCTOBER TERM, 1989

SECURITIES INDUSTRY ASSOCIATION, PETITIONER

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Comptroller of the Currency reasonably determined that the issuance and public sale by a national bank of mortgage pass-through certificates evidencing interests in pools of the bank's own conventional mortgage loans are authorized banking activities that are not prohibited by the Glass-Steagall Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 885 F.2d 1034. The memorandum and order of the district court (Pet. App. 43a-54a) is reported at 703 F. Supp. 256. The administrative ruling of Robert L. Clarke, Comptroller of the Currency (Pet. App. 56a-76a), is reported at [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,612.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1989. The petition for a writ of certiorari was filed on November 9, 1989. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Section 24 of Title 12, which codifies Section 8 of the National Banking Act of 1864, as amended, and Section 16 of the Glass-Steagall Act, provides in pertinent part:

> [A] national banking association * * * shall have power–
>
> * * * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; * * * The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock.

2. Section 371(a) of Title 12 provides:

> Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to such terms, conditions and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation.

3. Section 21(a)(1) of the Glass-Steagall Act, 12 U.S.C. 378(a)(1), provides in pertinent part:

> [I]t shall be unlawful–
>
> (1) For any person, firm, corporation, association, business trust, or other similar organization engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits * * * *Provided*, That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities, or issuing securities, to the extent permitted to national banking associations by the provisions of section 24 of this title: *Provided further*, That nothing in this paragraph shall be construed as affecting in any way such right as any bank * * * may otherwise possess to sell, without recourse or agreement to repurchase, obligations evidencing loans on real estate.

STATEMENT

1. Under 12 U.S.C. 24 Seventh, national banks are authorized to exercise "all such incidental powers as shall be necessary to carry on the business of banking," including "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." In 1927, this Court held that a national bank's practice of selling its mortgages was "within the

recognized limits of" these powers. *First National Bank* v. *City of Hartford*, 273 U.S. 548, 560 (1927).

The power of banks to sell their mortgages has since been expressly recognized in the banking statutes, including the Glass-Steagall Act. Under 12 U.S.C. 371(a), a national bank "may * * * sell loans or extensions of credit secured by liens on interests in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency." And Section 21(a)(1) of the Glass-Steagall Act, 12 U.S.C. 378(a)(1), which generally prohibits persons engaged in the business of "underwriting, selling or distributing * * * securities" from accepting deposits, reserves any right that a bank "may otherwise possess to sell, without recourse or agreement to repurchase, obligations evidencing loans on real estate."

Because residential mortgage loans are typically of longer duration than deposits and other sources from which banks obtain funds, banks have traditionally sold those loans in order effectively to manage their assets and liabilities. Pet. App. 5a. An increasingly popular means of facilitating sales of mortgages is the use of mortgage pass-through certificates. The purchaser of such a certificate obtains an undivided interest in a pool of the bank's conventional mortgages, rather than a single mortgage.[1] The question presented by this

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[1] See generally H. Altarescu, E. Anderson, M. Asay & H. Hinkle, *The Conventional Mortgage Pass-Through Market*, The Handbook of Mortgage-Backed Securities 147, 148-151 (F.J. Fabozzi ed. 1988); H. Sullivan & L. Lowell, *Mortgage Pass-Through Securities*, The Handbook of Mortgage-Backed Securities 69 (F.J. Fabozzi ed. 1988). The sale of pass-through instruments is accounted for as a sale of the originator's assets and is not a debt obligation of the originator. See Pet. App. 59a. For federal

case is whether national banks are authorized to sell their conventional mortgages in the form of these pass-through certificates.

2. In a Prospectus and Supplemental Prospectus dated January 23, 1987, Security Pacific National Bank offered pass-through certificates representing undivided interests in pools of fixed-rate residential mortgages originated by Security Pacific in the ordinary course of its mortgage lending activities. Pet. App. 5a. Under the program outlined in the prospectuses, the mortgage loans in the pools were to be assigned to a trustee (a nonaffiliated bank). *Id.* at 6a. In exchange for the loans, Security Pacific was to receive the certificates from the trustee and convey them to the certificateholders. *Ibid.* As servicer of the pooled mortgage loans, Security Pacific undertook to make monthly payments of principal and income, less a service charge, to the certificateholders. *Ibid.*

The Supplemental Prospectus contained a bold face statement that the certificates were not obligations of Security Pacific or its parent holding company. Pet. App. 58a. The parent holding company provided limited credit support for the certificates in the form of a guaranty of no more than ten percent of the aggregate principal balance of the mortgage loans. *Id.* at 7a, 58a n.5. Certificateholders were to bear all risk of delinquency and loss not covered by the applicable credit support. *Id.* at 6a, 59a.

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income tax purposes, holders of mortgage pass-through certificates are ordinarily treated as if they owned the underlying mortgage loans. H. Altarescu, E. Anderson, M. Asay & H. Hinkle, *supra*, at 150.

The prospectuses stated that the certificates would be sold in a series of public offerings registered with the Securities and Exchange Commission. Pet. App. 59a-60a. Security Pacific undertook to sell some of the certificates itself, and others were to be sold by an underwriter. *Id.* at 7a.

On February 23, 1987, the sale of certificates described in the prospectuses closed, and the certificates were delivered to their purchasers. Pet. App. 7a.

3. After the sales had closed, petitioner sent a letter to the Comptroller of the Currency, asking the Comptroller to review the activities described in the prospectuses and determine that those activities were in violation of the Glass-Steagall Act, 12 U.S.C. 24 Seventh, 78, 377, 378. Pet. App. 8a. In response, the Comptroller issued a twenty-page letter to Security Pacific, a copy of which was sent to petitioner. *Id.* at 56a-76a.

The Comptroller concluded that Security Pacific's pass-through certificate program was "authorized under the national banking laws and * * * substantially in accord with a long line of OCC precedents recognizing that the Glass-Steagall Act does not restrict the means by which national banks may sell or transfer interests in * * * their mortgage[s] and mortgage-related assets." Pet. App. 57a. The sale of pass-through certificates, the Comptroller explained, "represents nothing more than the negotiation of evidences of debt and the sale of real estate loans, which is expressly authorized under 12 U.S.C. §§ 24 Seventh and 371(a)." *Id.* at 61a; see *id.* at 62a-63a. "The fact that the negotiation and sale may be accomplished through the creation and sale by a bank of participation certificates, an activity [OCC] has long approved," he continued, "does not alter in

any respect the substance of the transaction, nor its permissibility under the national banking laws." *Id.* at 61a.[2]

In view of national banks' express authority to sell their mortgages, the Comptroller declared that there could be "no legitimate doubt that the national banking laws permit such sales to be accomplished through the issuance and sale of mortgage-backed * * * certificates." Pet. App. 63a. The Comptroller found two sources of statutory authority for that technique. He concluded that the use of pass-through certificates was expressly authorized as a "'new way' of conducting an established banking practice," *id.* at 64a, and that this form of sale was "convenient or useful" to a bank's express authority to sell its mortgage assets and was thus encompassed by Security Pacific's "incidental" bank powers, *id.* at 64a-65a (quoting *Arnold Tours, Inc.* v. *Camp*, 472 F.2d 427, 432 (1st Cir. 1972)).[3]

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[2] The Comptroller's letter cited eight published letters, dating back to 1977, in which the OCC had approved similar arrangements. The Comptroller observed that "nearly every feature of" the program at issue "has met with [the OCC's] prior approval." Pet. App. 60a.

[3] The Comptroller noted (Pet. App. 64a n.10) that he considered the "convenient or useful" test applied in *Arnold Tours* to be overly restrictive in view of the more flexible standards employed by this Court in construing the "incidental powers" clause. See *Franklin National Bank* v. *New York*, 347 U.S. 373, 377 (1954); *Colorado National Bank* v. *Bedford*, 310 U.S. 41, 48-50 (1940); *Clement National Bank* v. *Vermont*, 231 U.S. 120, 140 (1913); *Wyman* v. *Wallace*, 201 U.S. 230, 243 (1906); *First National Bank* v. *National Exchange Bank*, 92 U.S. 122, 127 (1876); *Merchants' Bank* v. *State Bank*, 77 U.S. (10 Wall.) 604, 648 (1871). The Comptroller concluded, however, that the use

Having found that "the sale of bank assets through this medium is authorized under the national banking laws," the Comptroller concluded that "the prohibitions of the Glass-Steagall Act are inapplicable to this transaction." Pet. App. 65a. The Comptroller observed that the Glass-Steagall Act was "designed in large part to remove commercial banks from the business of investment banking" – *i.e.*, to eliminate risk arising from "bank participation in speculative securities investment and trading activities, as well as * * * the peculiar 'hazards' present in the combination of commercial banking with traditional securities dealing and underwriting activities." *Ibid.* Noting that there "is no suggestion either in [the Act's] language or legislative history * * * that it was designed to interfere with lawful banking functions" such as the program at issue, the Comptroller found that Security Pacific's pass-through certificates were not "securities" within the meaning of the Act (*id.* at 66a-67a); that the public sale of the certificates was not an "underwriting" under the Act (*id.* at 67a-70a); and that the issuance and public sale of the certificates did not give rise to any of the hazards which the Act was designed to prevent (*id.* at 73a-76a).

4. Petitioner filed this action for injunctive and declaratory relief against the Comptroller and the Office of the Comptroller of the Currency, and Security Pacific intervened. The complaint alleged that the Comptroller's determination violated Sections 16, 21, 20, and 32 of the Glass-Steagall Act, 12 U.S.C. 24 Seventh, 378, 377, and 78. The district court granted

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of pass-through certificates as a means of facilitating the sale of mortgages satisfied even the *Arnold Tours* test. Pet. App. 64a.

summary judgment in petitioner's favor. Pet. App. 43a-54a.

Emphasizing the form of the transaction at issue, the district court declared that once mortgages are pooled for purposes of selling participations, "the assets as a group take on a separate identity" and have "a life distinct from that of the bank." Pet. App. 49a. Consequently, the court reasoned, the transaction at issue was "no mere sale of assets and the general statutory banking powers are limited by specific statutory prohibitions." *Id.* at 50a.

Noting that "[a] bank's sale of interests in a separate entity is an underwriting of securities prohibited by the [Glass-Steagall] Act," the court reviewed decisions addressing the meaning of "security" and "underwriter" under the Securities Acts and concluded that the sale of pass-through certificates was "a prohibited underwriting of securities within the meaning of the securities laws." Pet. App. 50a-52a. It dismissed the Comptroller's analysis of the purposes served by sales of pass-through certificates as "irrelevant," adding that the sale of pass-through certificates "gives rise to an interest in the success of the sales" that would conflict with Congress's intention to separate "the role of a commercial bank from the role of an advocate with an interest in supporting the sale of a particular security." *Id.* at 52a-53a. The court also declared that the Comptroller's construction of the statute did not "sufficiently consider the banking laws' purpose of protecting the investing public." *Ibid.*

3. The court of appeals reversed and remanded with a direction to dismiss the complaint. Pet. App. 1a-42a. Noting that it was bound by decisions of this Court to "give great weight to any reasonable construc-

tion of a regulatory statute adopted by the agency charged with the enforcement of that statute," *id.* at 18a (quoting *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971)), the panel upheld the Comptroller's determination of the legality of Security Pacific's program.

The court found support for the Comptroller's conclusion in *Securities Industries Ass'n* v. *Board of Governors*, 468 U.S. 137, 158-159 n.11 (1984) (*SIA*). There, in the course of explaining the relation between the authority that banking statutes confer on banks to buy and sell (discount and negotiate) commercial paper and Section 16's prohibition on the "business of dealing in securities," this Court noted that the business of dealing in securities could not be construed to include discounting promissory notes "because that activity is defined to be part of the business of banking." 468 U.S. at 159 n.11. Similarly, the court of appeals reasoned, the "threshold question" in this case was "whether the challenged activity of [Security Pacific] constitutes 'the business of banking' or, instead, the 'business of dealing in securities and stock.'" Pet. App. 32a.

The court of appeals upheld the Comptroller's determination that the sale of mortgages by means of pass-through certificates was an authorized aspect of the business of banking. The court had "no difficulty concluding that 12 U.S.C. 371(a) supports the Comptroller's conclusion that [Security Pacific] has the express power to sell its mortgage loans." Pet. App. 33a. And it agreed with the Comptroller that the use of such certificates was authorized under the "incidental powers" provision of 12 U.S.C. 24 Seventh, since pass-through certificates are "'convenient [and] useful in

connection with the performance of' [Security Pacific's] power to sell its mortgage loans." Pet. App. 34a (quoting *Arnold Tours, Inc.* v. *Camp*, 472 F.2d at 432).[4]

The court also upheld the Comptroller's determination that if the transaction was authorized under 12 U.S.C. 24 Seventh, it could not be invalidated under Section 21(a)(1) of the Glass-Steagall Act, 12 U.S.C. 378(a)(1). The court found that two provisos in Section 21 – provisos that preserve, respectively, the authority that banks derive from Section 16 to engage in securities-related activities and their power to sell "obligations evidencing loans on real estate," 12 U.S.C. 378(a)(1) – "clarify the relationship between sections 16 and 21 and support the Comptroller's view that section 21 cannot be read to prohibit [Security Pacific's] activity, as it is permitted by section 16." Pet. App. 35a.

Finally, the court of appeals rejected each of the grounds on which the district court had relied in its decision. The panel found that the district court's analysis of the form of the transaction – under which "[t]he mere fact that the certificate mechanism was used to sell otherwise salable mortgage loans transformed the transaction * * * into the unlawful 'underwriting of securities'" – "erred in attributing such significance to [Security Pacific's] pooling of the mortgages and sale of certificates." Pet. App. 37a. The court of appeals noted that the bank's interest in

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[4] The court thus found it unnecessary to address the Comptroller's determination that the use of pass-through certificates was also expressly authorized as a "new way" of exercising an express power. Pet. App. 34a n.7.

selling pass-through certificates was substantially the same as the bank would have in selling the mortgages themselves; thus, the panel found that "the Comptroller's analysis demonstrating why this transaction does not implicate the 'subtle hazards' legislated against by Congress in the Glass-Steagall Act" was "reasonable." *Id.* at 39a. The court of appeals noted that, contrary to the district court's view, the Glass-Steagall Act focuses on the protection of banks and their depositors, not the investing public. *Id.* at 40a. Finally, the panel observed that the Securities Acts are not dispositive on the question whether an instrument is a "security" within the meaning of the banking statutes. *Id.* at 41a.

ARGUMENT

Applying an appropriately deferential standard of review, the court of appeals upheld the most recent of a number of rulings by the Comptroller approving transactions similar to those at issue here. The court's decision – which confirms banks' authority to market their own mortgages in a form that is attractive to the public but that poses none of the "subtle hazards" that underlay Congress's decision to separate commercial from investment banking – is consistent with the applicable banking statutes and does not conflict with decisions of this Court of any other court of appeals. Further review is therefore not warranted.

1. As this Court established in *First National Bank* v. *City of Hartford*, *supra*, and as the banking statutes now expressly recognize, national banks are authorized to sell their own mortgage loans. Further, whether the use of pass-through certificates is expressly authorized (as the Comptroller found) or is "incidental"

to the exercise of banks' express power to sell mortgages (as both the Comptroller and the court concluded), that technique falls within the authority banks possess to conduct the "business of banking." 12 U.S.C. 24 Seventh. As the Comptroller explained in his determination, effective marketing of mortgages is an important aspect of prudent bank management. Sales of mortgages, which pass-through certificates facilitate, enable banks to provide needed liquidity to their mortgage portfolios, thereby generating funds for new lending and easing "management of the maturity mismatch problems inherent in funding long term mortgages with shorter term deposits." Pet. App. 62a. "Given the current, troubled condition of the banking industry and certain sectors of the nation's economy, the need for liquidity and the ability to engage in sound asset-liability management practices is all the more important to the maintenance of a safe and sound banking system." *Id.* at 63a.

Nevertheless, petitioner contends that the Glass-Steagall Act must be construed to withdraw the authority that banks would otherwise possess to conduct this aspect of the "business of banking." See Pet. 7-8. The Comptroller and a unanimous court of appeals properly refused to accept that understanding of the relevant statutes.

a. In *SIA*, *supra*, this Court held that third-party commercial paper was a "security" for purposes of the Glass-Steagall Act. Because the Act prohibits banks from engaging in the "business of dealing in securities" for their own account, but banks have traditionally bought and sold commercial paper, the Court necessarily addressed whether its holding could make those transactions illegal. The Court explained that it would

not. Noting that the authority to conduct the "business of banking" includes the authority to discount commercial paper, the Court made clear that the Glass-Steagall Act's prohibition on the "business of dealing in securities" "does not affect this authority." 468 U.S. at 159 n.11. The Court continued (*ibid.*):

> [W]hile the Glass-Steagall Act does not define the term "business of dealing" in securities, the term clearly does not include the activity of "discounting" promissory notes because that activity is defined to be a part of the "business of banking."

See also, *e.g.*, *Board of Governors of the Federal Reserve System* v. *Investment Company Institute*, 450 U.S. 46, 63 (1981) (Section 21 was "not intended to require banks to abandon an accepted banking practice that was subjected to regulation under § 16"); *Investment Company Institute* v. *Camp*, 401 U.S. at 624-625.

b. Here, likewise, the Comptroller determined that "the sale of bank assets through [the] medium [of pass-through certificates] is authorized under the national banking laws" and, accordingly, that "the prohibitions of the Glass-Steagall Act are inapplicable to this transaction." Pet. App. 65a. This analysis not only comports with this Court's decision in *SIA*, but also properly accommodates the powers conferred on national banks to engage in the "business of banking," 12 U.S.C. 24 Seventh, and the Glass-Steagall Act's prohibitions on banks' engaging in the "business of dealing in securities."

The purpose of Sections 16 and 21 of the Glass-Steagall Act is to "demarcate the line separating commercial banking and investment banking." *SIA*, 468 U.S. at 148. Thus, in any case, the proper issue is whether a challenged practice falls within the

"business of banking," 12 U.S.C. 24 Seventh – or, on the other hand, constitutes (in terms of Section 21 of the Glass-Steagall Act) "the business of issuing, underwriting, selling, or distributing * * * stocks, bonds, debentures, notes or other securities," 12 U.S.C. 378(a)(1), or (in terms of Section 16 of the Act) "the business of dealing in securities and stock," or the "underwrit[ing] [of] securities or stock," 12 U.S.C. 24 Seventh.[5] The Comptroller has read these provisions *in pari materia*, in order to preserve banks' traditional banking powers while prohibiting their entry into the securities business. Under his interpretation, which the court of appeals properly found to be reasonable, sales of assets that fall within the "business of banking" are not deemed to be among those aspects of the securities business that are off limits to banks under the Glass-Steagall Act.

Indeed, the Glass-Steagall Act expressly preserves the powers that banks possess to market their mortgages. Section 21 of the Act provides that "nothing in this paragraph shall be construed as affecting in any way such right as any bank * * * may otherwise possess to sell, without recourse or agreement to repurchase, obligations evidencing loans on real estate."

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[5] That the Act contains a "system of flat 'prohibitions' and 'prophylactic' measures * * * cannot obviate the need to examine particular factual situations to determine on which side of the prohibitory line they fall." *Securities Industry Ass'n* v. *Board of Governors of the Federal Reserve System*, 839 F.2d 47, 66 (2d Cir.), cert. denied, 108 S. Ct. 2830 (1988).

12 U.S.C. 378(a)(1).[6] Pass-through certificates are among the "obligations evidencing loans on real estate" which banks are otherwise authorized by 12 U.S.C. 24 Seventh to sell. See Pet. App. 67a n.12, 73a. Petitioner makes no effort to reconcile its interpretation of the Glass-Steagall Act with this proviso.

c. The Comptroller's application of the banking statutes is also consistent with the legislative history of the Glass-Steagall Act. As the Comptroller observed, "the Act addressed itself primarily to the risks to commercial bank assets and capital posed by bank participation in speculative securities investment and trading activities, as well as to the 'peculiar hazards' present in the combination of commercial banking with traditional securities dealing and underwriting activities." Pet. App. 65a. See *SIA*, 468 U.S. at 144-148; *Investment Company Institute* v. *Camp*, 401 U.S. at 629-634. To our knowledge, none of the Act's supporters intimated that it was meant to affect the ability of banks to market their own mortgage loans.

The excerpts that petitioner cites from remarks by Senator Buckley and Representative Bacon (Pet. 11) do not suggest otherwise. As the context omitted by petitioner indicates, the focus of these Congressmen's concerns was not sales of interests in banks' loans as such, but rather sales of bonds issued by a corporate borrower in order to retire its bank loans. For instance, Senator Buckley's remarks were addressed to the situation of a "corporation, [which] having carried its account with a bank, having borrowed from that bank

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[6] Since Sections 16 and 21 "seek to draw the same line," *SIA*, 468 U.S. at 149, this proviso is also properly viewed as a limit on Section 16.

for its ordinary commercial requirements, is confronted with the question of raising long-term funds by the issuance of securities." 75 Cong. Rec. 9912 (1932). Senator Buckley expressed the view that legislation was appropriate to prevent a bank in that situation from urging the borrower to issue securities to retire the debt, from urging the bank's customers to purchase those securities, and from financing the customers' purchases of the corporation's securities. *Ibid.* Representative Bacon's statement is to the same effect. These statements cannot fairly be construed to express disapproval of the type of transaction at issue here, a sale of certificates representing the bank's own loans.[7] Thus, the legislative history does not support petitioner's assertion that a "core congressional concern underlying enactment of Glass-Steagall was the potential that banks could set up their loans into pools and then sell interests in them" (Pet. 10).[8]

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[7] A pass-through certificate is not a "bond" – *i.e.*, a promissory note in which the issuer promises to pay principal and interest on a given schedule.

Though petitioner cites secondary sources that were critical of the practice of selling interests in mortgages, Pet. 11 n.14, there is no evidence that Congress acted on or was even cognizant of those concerns when it enacted the Glass-Steagall Act.

[8] Contrary to petitioner's suggestion (Pet. 18-20), various statutes enacted after the Glass-Steagall Act do not cast doubt upon banks' authority to sell mortgages by means of pass-through certificates. For instance, the 1968 amendment to 12 U.S.C. 24 on which petitioner relies (Pet. 19) was enacted in order "to be certain" that banks could issue and sell obligations guaranteed by the Government National Mortgage Association (114 Cong. Rec. 15,236 (1968) (remarks of Sen. Bennett)), and

e. As the Comptroller recognized and the court of appeals agreed, sales of pass-through certificates implicate none of the "subtle hazards" that the Glass-Steagall Act was designed to foreclose. Pet. App. 39a, 74a-75a. "If some conflict of interest is present in the bank's simultaneously advising its depositors on financial matters and selling mortgage pass-through certificates, that conflict is no less present where the bank sells the single mortgage loans directly, instead of by means of pass-through certificates." *Id.* at 39a. The Comptroller explained carefully why sales of pass-

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is thus appropriately viewed as a clarification of banks' preexisting powers. See, *e.g.*, *Callejas* v. *McMahon*, 750 F.2d 729, 731 (9th Cir. 1984) (an amendment to a statute need not "indicate that the legislature intended to change a law").

Nor does Congress' enactment of the Secondary Mortgage Market Enhancement Act of 1984 (SMMEA), Pub. L. No. 98-440, 98 Stat. 1689, reflect an assumption on the legislature's part that banks have been prohibited from selling their own assets by means of pass-through certificates. Section 105(c) of the SMMEA amended Section 16 of the Glass-Steagall Act to exempt "mortgage related securities" from the limitation on bank *purchases* of securities issued by other entities for their own accounts. The other enactments to which petitioner alludes also authorize underwriting or dealing in obligations issued by third parties, not the banks themselves. *E.g.*, National Housing Act Amendments of 1938, ch. 13, § 13, 52 Stat. 26; Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. No. 89-754, §504(a)(1), 80 Stat. 1277.

Petitioner argues (Pet. 17-22) that the court of appeals' failure to address these enactments in its decision raises serious separation of powers issues. However, this contention represents nothing more than a reformulation of the argument that the court misconstrued the statute by giving insufficient weight to petitioner's asserted view of the significance of statutes passed after the Glass-Steagall Act.

through certificates will not encourage unsound banking practices (*id.* at 74a-75a), and petitioner presents no reason why the use of that vehicle to sell a bank's own mortgages must be equated with underwritings of a third-party issuer's securities.

The Comptroller's interpretation and application of the banking statutes in the circumstances of this case is entitled to "great weight" (*Investment Company Institute* v. *Camp*, 401 U.S. at 626-627):

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of those laws.

Accord *Investment Company Institute* v. *Conover*, 790 F.2d 925, 935 (D.C. Cir.) (Comptroller's interpretation of the Glass-Steagall Act may well be permissible "even if it is one which the court would not have rendered had it been interpreting the statute in the first instance"), cert. denied, 479 U.S. 939 (1986). Here, the Comptroller reasonably determined that a bank's use of pass-through certificates to market its mortgages was among the powers incidental to the business of banking that the Glass-Steagall Act does not withdraw. That determination took due account of the language and structure of the relevant statutes, their legislative history, prior decisions by the Comptroller and the courts, the value of this vehicle to prudent bankers, and the absence of the "subtle hazards" at which the Glass-

Steagall Act was aimed.[9] The court of appeals was thus correct in upholding the Comptroller's decision.

2. Contrary to petitioner's contention (Pet. 14-17), the Comptroller's determination does not conflict with the decisions of this Court in *SIA*, *supra*, and *Investment Company Inst.* v. *Camp*, *supra.* In neither case did this Court hold that activities encompassed within the "business of banking" were nevertheless prohibited by the Glass-Steagall Act. In *SIA*, this Court held that commercial paper issued by a bank's customer was a "security" within the meaning of the Glass-Steagall Act and thus that the bank's placements of that paper were potentially subject to the Act's prohibition on underwriting securities.[10] Nothing in that decision, however, suggested that the Glass-Steagall Act's prohibition on underwriting securities would subtract from banks' power to engage in the "business of banking" by discounting and negotiating commercial paper. To the contrary, the Court observed that "the authority to

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[9] Contrary to petitioner's contention (Pet. 21), there is no conflict between the Comptroller's ruling in this case and a December 12, 1977 ruling of the Comptroller, *Investment Securities Regulation*, [1978-1979 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,082 (Dec. 12, 1977), that justifies withholding deference from the Comptroller's interpretation. The latter determination did not address a bank's issuance and sale of certificates representing its own mortgages. Instead, it addressed the limits imposed upon a national bank's *purchase* of certificates collateralized by mortgages issued by *another* financial institution.

[10] On remand, the D.C. Circuit held that by making private placements of commercial paper, the banks were not "underwriting" it within the meaning of the Act. *Securities Industries Ass'n* v. *Board of Governors*, 807 F.2d 1052 (1986), cert. denied, 483 U.S. 1005 (1987).

discount commercial paper is very different from the authority to underwrite it." 468 U.S. at 158. Indeed, although members of the Court reached different conclusions on whether commercial paper was a security for purposes of the Glass-Steagall Act, both the majority and dissenting opinions construed the Glass-Steagall Act in a manner that would not alter banks' ability to exercise their traditional banking powers. 468 U.S. at 158-159 n.11; *id.* at 175-177 (O'Connor, J., dissenting).

Similarly, *Investment Company Institute* v. *Camp*, *supra*, did not raise the question whether the Glass-Steagall Act prohibited the exercise of a power within the business of banking. That case involved sales of transferable participations in commingled assets that the bank held as a managing agent, rather than a trustee. As the Court noted, this arrangement represented an attempt at a "union" of banking powers. Though it was concededly not improper to exercise any of those powers separately – "to pool trust assets, *or* to act as a managing agent for individual customers, *or* to purchase stock for the account of its customers" – the "union of these powers" was found to "give[] birth to an investment fund whose activities *are of a different character*." 401 U.S. at 625 (emphasis added). The Court held, accordingly, that the "operation of an investment fund" of this kind "involves a bank in the underwriting, issuing, selling, and distributing of securities in violation of §§ 16 and 21 of the Glass-Steagall Act." 401 U.S. at 639. By contrast, in this case, the Comptroller determined that the use of pass-through certificates "represents nothing more than the negotiation of evidences of debt and the sale of real estate loans, which is expressly authorized by" the

banking statutes. Significantly, the courts of appeals have unanimously rejected the contention that *Camp* forecloses the sale of "units of beneficial interest" in IRA trust funds managed by banks for their customers, even though such funds bear marked similarities to the investment funds at issue in *Camp*. *Investment Company Institute* v. *Conover*, 790 F.2d at 929-931; *Investment Company Institute* v. *Clarke*, 793 F.2d 220 (9th Cir.), cert. denied, 479 U.S. 939 (1986); *Investment Company Institute* v. *Clarke*, 789 F.2d 175 (2d Cir.) (per curiam), cert. denied, 479 U.S. 940 (1986).[11] Like the pass-through certificates at issue here, these IRA instruments have been held to represent a permissible vehicle through which banks may exercise an established bank power – the power to commingle assets held in trust for the bank's customers.

Nor is there any conflict (see Pet. 13) between the Comptroller's determination in this case and the ruling of the Federal Reserve Board in *Citicorp*, 73 Fed. Res. Bull. 473 (1987), aff'd *sub nom. Securities Industry Ass'n* v. *Board of Governors*, 839 F.2d 47 (2d Cir.),

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[11] These decisions also reflect that the use of an instrument registered with the SEC as a "security" for purposes of the Securities Acts does not require the conclusion that the instrument is a "security" for purposes of the Glass-Steagall Act. See *SIA*, 468 U.S. at 174-175 (O'Connor, J., dissenting).

Here, the Comptroller explained why the sales of the pass-through certificates at issue should not be considered an "underwriting" of "securities" for purposes of the banking statutes. Certificates of that type are "legally transparent" – *i.e.*, in substance no different from the underlying mortgages – and a bank that sells its own certificates is not "underwriting" in the sense in which term is ordinarily used – that is, purchasing and reselling another party's securities. Pet. App. 66a-70a.

cert. denied, 108 S. Ct. 2830 (1988). The issue in *Citicorp* was whether non-bank subsidiaries of three bank holding companies could underwrite and deal in securities issued *by third parties* including, *inter alia*, mortgage-related securities. The ruling did not address the authority of banks to sell participations in mortgages that they themselves have originated. Petitioner simply obfuscates the distinction between underwriting securities – *i.e.*, purchasing them from an issuer and in turn distributing them to investors – and selling pass-through certificates corresponding to the bank's *own* mortgage loans.

3. Contrary to petitioner's assertion (Pet. 12), the decision below does not authorize bank underwriting of virtually all securities, including all third-party securities. The decision below pertains only to a national bank's issuance and public sale of pass-through certificates evidencing interests in the issuing bank's own mortgages; it does not address any other type of transaction. There is no conflict among the courts of appeals on the question presented by the petition, and further review is not warranted to consider the potential scope of the Second Circuit's reasoning in the abstract.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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